

**PLAINTIFFS'
RESPONSE TO
GOOGLE'S
ADMINISTRATIVE
MOTION (DKT. 810)
RE: NEWLY
REVEALED
INCOGNITO-
DETECTION BIT**

**Redacted Version of
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BOIES SCHILLER FLEXNER LLP

David Boies (admitted pro hac vice)

333 Main Street

Armonk, NY 10504

Tel: (914) 749-8200

dboies@bsfllp.com

Mark C. Mao, CA Bar No. 236165

Beko Reblitz-Richardson, CA Bar No.
238027

Erika Nyborg-Burch, CA Bar No. 342125

44 Montgomery St., 41st Floor

San Francisco, CA 94104

Tel.: (415) 293-6800

mmao@bsfllp.com

brichardson@bsfllp.com

enyborg-burch@bsfllp.com

James Lee (admitted pro hac vice)

Rossana Baeza (admitted pro hac vice)

100 SE 2nd St., 28th Floor

Miami, FL 33131

Tel.: (305) 539-8400

jlee@bsfllp.com

rbaeza@bsfllp.com

Alison L. Anderson, CA Bar No. 275334

725 S Figueroa St., 31st Floor

Los Angeles, CA 90017

Tel.: (213) 995-5720

alanderson@bsfllp.com

SUSMAN GODFREY L.L.P.

Bill Carmody (admitted pro hac vice)

Shawn J. Rabin (admitted pro hac vice)

Steven M. Shepard (admitted pro hac vice)

Alexander Frawley (admitted pro hac vice)

1301 Avenue of the Americas, 32nd Floor

New York, NY 10019

Tel.: (212) 336-8330

bcarmody@susmangodfrey.com

srabin@susmangodfrey.com

sshepard@susmangodfrey.com

afrawley@susmangodfrey.com

Amanda K. Bonn, CA Bar No. 270891

1900 Avenue of the Stars, Suite 1400

Los Angeles, CA 90067

Tel.: (310) 789-3100

abonn@susmangodfrey.com

MORGAN & MORGAN

John A. Yanchunis (admitted pro hac vice)

Ryan J. McGee (admitted pro hac vice)

201 N. Franklin Street, 7th Floor

Tampa, FL 33602

Tel.: (813) 223-5505

jyanchunis@forthepeople.com

rmcgee@forthepeople.com

Michael F. Ram, CA Bar No. 104805

711 Van Ness Ave, Suite 500

San Francisco, CA 94102

Tel: (415) 358-6913

mram@forthepeople.com

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

CHASOM BROWN, WILLIAM BYATT,
JEREMY DAVIS, CHRISTOPHER
CASTILLO, and MONIQUE TRUJILLO
individually and on behalf of all other similarly
situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No.: 4:20-cv-03664-YGR-SVK

**PLAINTIFFS' RESPONSE TO
GOOGLE'S ADMINISTRATIVE
MOTION (DKT. 810) RE: NEWLY
REVEALED INCOGNITO-DETECTION
BIT**

Judge: Hon. Susan van Keulen

1 **I. INTRODUCTION**

2 This motion concerns Google’s most recent violation of this Court’s orders. Google wants
 3 to “deprecate” an Incognito-detection bit—[REDACTED]—that Google *concealed from*
 4 *discovery and only disclosed to Plaintiffs on December 20, 2022*, and which Google admits
 5 applies to private browsing modes *not covered by the three previously disclosed Incognito-*
 6 *detection bits*. Translation: Google wants to destroy evidence that it unlawfully concealed from
 7 discovery.

8 This request follows Google’s violation of three court orders where Google withheld
 9 discovery that goes to the heart of this case, namely, Google’s tracking and use of private
 10 browsing data. *See* Dkt. 588-1. Google’s motion relies on the same tired Google say-so about
 11 relevance that has already resulted in sanctions. Plaintiffs now respectfully ask that, in addition
 12 to denying Google’s motion, this Court consider its import for the pending Order to Show Cause.
 13 This newly disclosed bit is clear proof that Google is deliberately violating this Court’s orders,
 14 intentionally depriving Plaintiffs of critical discovery, and deliberately prejudicing Plaintiffs’
 15 ability to seek all warranted injunctive relief on behalf of the newly certified Rule 23(b)(2) class.
 16 More severe sanctions are warranted, including terminating sanctions.

17 **II. ARGUMENTS AND AUTHORITIES**

18 **A. After Representing that It Provided Complete Discovery into Its Tracking**
 19 **and Use of Private Browsing Data, Google Recently Admitted that It Is**
 20 **Simply Choosing Not to Comply with this Court’s Orders.**

21 While this motion concerns Google’s latest discovery abuse, the context is important.
 22 Google insisted throughout discovery that it had complied with this Court’s orders. For example,
 23 on October 27, 2021, Google assured the Court that it “*fully complied* with the Court’s various
 discovery orders, including the April 30 . . . and September 16 orders.” Dkt. 312 at 1.

24 Yet on November 12, 2021, this Court found that “Google did not comply with” the April
 25 30 and September 16 orders, and ordered Google to provide a declaration affirming that it
 26 “provided a complete list of data sources that contain information relevant to Plaintiffs’ claims.”
 27

1 Dkt. 588-1 at 35 (citing Dkts. 147-1, 273, 331).¹ This Court later found that Google did not
 2 comply with the November 12 order either, and sanctioned Google for committing “discovery
 3 misconduct” by “failing to turn over relevant evidence regarding its ability to identify Incognito
 4 traffic,” in violation of all three orders. Dkt. 588-1 at 41 (“Sanctions Order”). Google was further
 5 ordered to investigate whether “other than the logs identified thus far as containing Incognito-
 6 detection bits, no other such logs exist.” *Id.* at 6.

7 Google has now come clean about at least one thing: it admits that it is *deliberately*
 8 *choosing not to comply*. Google on August 22, 2022 stated that it “*reconsider[ed]* the Court’s
 9 May 20 Order” to eliminate the requirement that it conduct a complete investigation into how it
 10 tracks private browsing data. Dkt. 695-3 at 3-4 (emphasis added). And in response to the Court’s
 11 Order to Show Cause (Dkt. 784), Google on November 30 revealed that it *could* conduct a
 12 complete investigation but has refused to do so because, according to Google: “*Conducting a*
 13 *complete search of fields in these logs would have been extremely expensive and time-*
 14 *consuming*” and so “*no such search has ever been conducted.*” Dkt. 797-6 ¶¶ 5-6. Recent
 15 developments confirm that Google’s (limited) investigation overlooked critical evidence.

16 **B. Google in Late December Disclosed a Brand New Incognito Detection Bit,**
 17 **Revealing Google’s Deliberate Concealment of Discoverable Evidence.**

18 Just before Christmas, on December 20, 2022, *Google disclosed for the first time yet*
 19 *another detection bit*—the [REDACTED] field at issue in this motion. *See* Mao Ex. 1.
 20 Google did not retrieve this bit through its investigation in response to the Sanctions Order;
 21 rather, Google’s counsel allegedly stumbled upon it through work for the *Calhoun* case. *Id.*
 22 *Worse*, Google’s counsel was aware of this bit since at latest October but waited until late
 23 December to disclose it, after the district court ruled on Plaintiffs’ motion for class certification,
 24 and after Google responded to this Court’s Order to Show Cause. *See* Mao Ex. 2.

25 Google’s “investigation” was designed to miss bits like [REDACTED]. Google
 26 limited its investigation to “instances in which the absence of the X-Client-Data header might be

27 ¹ That order of course covered this newly disclosed [REDACTED] bit.

1 treated as indicative of Incognito browsing.” Dkt. 797-3 at 3. But unlike the three previously
 2 identified bits,² this new one does not rely on the X-Client-Data Header. *See* Ex. 1 (describing a
 3 different logic by which this bit was [REDACTED]

4 [REDACTED]. In other words, *this bit is from a different family*. Google
 5 concealed this bit—and perhaps other bits in the same family or still undisclosed families—by
 6 limiting its investigation to just the X-Client-Data Header family. As a result of this *self-imposed*
 7 limitation, Plaintiffs will never know how many Incognito detection bits exist, nor what they do.

8 In violation of blackletter law, Google has throughout this case unilaterally limited the
 9 scope of its discovery obligations without seeking a protective order. Google does not get to
 10 “make unilateral decisions about what evidence was relevant.” *Leon v. IDX Sys. Corp.*, 464 F.3d
 11 951, 956 (9th Cir. 2006) (quoting district court and affirming terminating sanction). Even after
 12 being sanctioned, Google continues to play umpire. The Sanctions Order warned Google that
 13 “the [Incognito] bits are within the scope of discoverable information” and that “*Google was not*
 14 *justified in unilaterally deciding not to provide discovery regarding the bits.*” Dkt. 588-1 at 25
 15 (emphasis added). But Google is still refusing to comply with the Court’s orders based on its own
 16 views about relevance, in direct violation of the Federal Rules of Civil Procedure. “Federal Rule
 17 of Civil Procedure 26(b)(1) provides a broad definition of relevance for purposes of discovery,”
 18 *Snipes v. United States*, 334 F.R.D. 548, 550 (N.D. Cal. 2020), and courts routinely “reject
 19 defendants’ attempt[s] to unilaterally designate [] documents as irrelevant,” *In re Subpoena to*
 20 *PayPal Holdings, Inc.*, 2020 WL 3073221, at *4 (N.D. Cal. June 10, 2020).

21 Google’s recent disclosure of the new bit is case-in-point. Google wants to “deprecate”
 22 the bit before Plaintiffs receive any information about it because, according to Google, the bit
 23 “affect[s] no relevant issue in this case.” Dkt. 810 at 1-2. Google’s penchant for unilateral (and
 24 incorrect) relevance determinations has led to the current state of play—where Google has
 25

26 ² Those three bits are: maybe_chrome_incognito; is_chrome_incognito; and
 27 is_chrome_non_incognito

1 succeeded in concealing the true scope of its tracking and use of private browsing data.

2 Google’s “relevance” argument is not only legally improper; it is factually baseless. The
 3 new bit is highly relevant, including in ways not covered by the previously disclosed bits. Unlike
 4 those bits, which only identified Chrome Incognito traffic, [REDACTED]
 5 [REDACTED] which means it covers Plaintiffs’ Class 2—i.e., users who
 6 browsed in non-Chrome private browsing modes. *See* Mao Ex. 1. Google’s assertion that Chrome
 7 changed “the relevant API” in 2019 (Dkt. 810 at 1) provides no information about whether the
 8 [REDACTED].

9 This Court should not be led astray by Google’s efforts to downplay the significance of
 10 the bit. Google claims that the logic for the bit (*i.e.*, the API “loopholes”) was “well documented
 11 in public reporting” and “illustrated in documents produced in this case.” Dkt. 810 at 3 & n.4.
 12 But the sources Google cites at most suggest that some *non-Google websites* may have used the
 13 “loophole”; the sources do not disclose that **Google** itself was exploiting this “loophole”,
 14 including by developing the [REDACTED] bit.³ In other words, Google openly criticized
 15 other websites for doing something that Google was doing too, just secretly. Google also misled
 16 Plaintiffs about this exact issue in discovery. Plaintiffs asked a Google employee about this
 17 “loophole,” and he testified that “Incognito detection . . . *has always* referred to the *site you are*
 18 *visiting* in Incognito mode, detecting that you are in fact, in Incognito mode.” Mao Ex. 3, Schuh
 19 Tr. 152:4-23 (emphases added). That employee did not disclose that Google was also using the
 20 same logic to detect private browsing traffic for its own benefit.

21 Finally, Google is silent on why it did not in 2019 “deprecate” the bit when it uncovered
 22 the “loophole.” Why wait until now—during this lawsuit and right after the district court certified
 23

24 ³ The cited Google blogpost noted that “*some sites* use an unintended loophole.” Dkt. 810 at 1
 25 n.1 (citing <https://blog.google/outreach-initiatives/google-news-initiative/protecting-private-browsingchrome/> (emphasis added)). The *Wired* article likewise discussed how “*third party*
 26 *websites*” were using the “loophole.” Dkt. 810 at 3 n.4 (citing <https://www.wired.co.uk/article/google-chromeincognito-mode-privacy> (emphasis added)). The
 27 only “produced” document Google cites discussed “a loophole that could be used *by websites* to
 28 detect Chrome Incognito Mode sessions.” Google Mot. Ex. 1 at -27 (emphasis added).

1 an injunctive relief class? The timing is suspicious, and Google’s request is wholly improper.

2 **C. Google’s Concealment Is Highly Material to Plaintiffs’ Case; Deprecation Is**
 3 **Manifestly Unjust.**

4 Google’s misconduct underscores the materiality of the prejudice that Plaintiffs are now
 5 facing, particularly for their injunctive relief classes, which were certified for all claims. Dkt.
 6 803. As part of their injunctive relief, Plaintiffs will seek an order requiring Google to, at least,
 7 “delete the private browsing information that it previously collected and is currently storing [and]
 8 remove any services that were developed or improved with the private browsing information.”
 9 *Id.* at 33. By artificially and unlawfully limiting discovery into Google’s tracking and use of
 10 private browsing data, Google seeks to prevent full compliance with that order for either Class 1
 11 or Class 2. *Worse*, Google now seeks this Court’s permission to destroy evidence that could be
 12 used to identify “services that were developed or improved with [] private browsing
 13 information,”—thus enabling those services to escape any injunction.⁴

14 Google’s deliberate concealment of discoverable evidence, which at a minimum is
 15 material to the injunctive relief Plaintiffs seek, warrants the most severe sanctions available,
 16 including terminating sanctions, i.e., where the court enters a default judgment against Google.
 17 “Where a party so damages the integrity of the discovery process that there can never be
 18 assurance of proceeding on the true facts, a case dispositive sanction may be appropriate. It [is]
 19 on this record,” where Google has now intentionally violated four court orders, including the
 20 Sanctions Order, and where Google is deliberately refusing to comply. *Valley Engineers Inc. v.*
 21 *Elec. Eng’g Co.*, 158 F.3d 1051, 1058 (9th Cir. 1998). Plaintiffs and Google will negotiate a
 22 stipulation regarding Plaintiffs’ intention to seek these more severe sanctions.⁵

23 ⁴ Google’s reliance on the district court’s denial of (b)(3) certification is also misplaced. Dkt. 810
 24 at 1. Plaintiffs’ Rule 23(f) appeal is pending, and if interlocutory review is denied, Plaintiffs will
 25 appeal as a matter of right at the end of this case. In any event, even without (b)(3) certification,
 the bit is relevant to any individual opt-out claims that users may bring. This Court should not
 bless Google’s request to prospectively spoliage.

26 ⁵ Google represented during a January 3 meet and confer that Google is likely amenable to a
 27 stipulation whereby Plaintiffs can seek these new requests in their January 20 OSC submission,
 and Google receives additional pages in its already scheduled Reply brief. Mao Decl. ¶ 2.

1 **III. CONCLUSION**

2 Plaintiffs respectfully request that the Court deny Google's motion.

3 Dated: January 4, 2023

By /s/ Mark Mao

4 Mark C. Mao (CA Bar No. 236165)
mmao@bsflp.com\

5 Beko Reblitz-Richardson (CA Bar No. 238027)
brichardson@bsflp.com

6 Erika Nyborg-Burch (CA Bar No. 342125)
enyborg-burch@bsflp.com

7 BOIES SCHILLER FLEXNER LLP

8 44 Montgomery Street, 41st Floor

San Francisco, CA 94104

9 Telephone: (415) 293 6858

Facsimile (415) 999 9695

10 David Boies (*pro hac vice*)

11 dboies@bsflp.com

BOIES SCHILLER FLEXNER LLP

12 333 Main Street

Armonk, NY 10504

13 Tel: (914) 749-8200

14 James W. Lee (*pro hac vice*)

jlee@bsflp.com

15 Rossana Baeza (*pro hac vice*)

rbaeza@bsflp.com

16 BOIES SCHILLER FLEXNER LLP

100 SE 2nd Street, Suite 2800

17 Miami, FL 33130

18 Telephone: (305) 539-8400

Facsimile: (305) 539-1304

19 Alison Anderson (CA Bar No. 275334)

aanderson@bsflp.com

20 BOIES SCHILLER FLEXNER LLP

725 S Figueroa Street

21 31st Floor

22 Los Angeles, CA 90017

Telephone: (213) 995-5720

23 Amanda Bonn (CA Bar No. 270891)

24 SUSMAN GODFREY L.L.P.

1900 Avenue of the Stars, Suite 1400

25 Los Angeles, CA 90067

26 Telephone: (310) 789-3100

1 Bill Carmody (*pro hac vice*)
2 bcarmody@susmangodfrey.com
3 Shawn J. Rabin (*pro hac vice*)
4 srabin@susmangodfrey.com
5 Steven Shepard (*pro hac vice*)
6 sshepard@susmangodfrey.com
7 Alexander P. Frawley (*pro hac vice*)
8 afrawley@susmangodfrey.com
9 SUSMAN GODFREY L.L.P.
10 1301 Avenue of the Americas, 32nd Floor
11 New York, NY 10019
12 Telephone: (212) 336-8330

8 John A. Yanchunis (*pro hac vice*)
9 jyanchunis@forthepeople.com
10 Ryan J. McGee (*pro hac vice*)
11 rmcgee@forthepeople.com
12 MORGAN & MORGAN, P.A.
13 201 N Franklin Street, 7th Floor
14 Tampa, FL 33602
15 Telephone: (813) 223-5505
16 Facsimile: (813) 222-4736

14 Michael F. Ram, CA Bar No. 104805
15 mram@forthepeople.com
16 MORGAN & MORGAN
17 711 Van Ness Ave, Suite 500
18 San Francisco, CA 94102
19 Tel: (415) 358-6913

18 *Attorneys for Plaintiffs*